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ORIGINAL

NO. 85-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or Connie Ford,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER A STATE PRISONER WHO HAS BEEN SENTENCED TO DEATH, AND WHO HAS WITHOUT QUESTION, BEEN SANE FROM THE TIME OF THE CRIMINAL OFFENSE, THROUGHOUT TRIAL AND FOR SEVEN YEARS THEREAFTER, MAY CLAIM, ON THE EVE OF EXECUTION, AN EIGHTH AND FOURTEENTH AMENDMENT RIGHT TO A JUDICIAL DETERMINATION OF HIS SANITY?

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Respondent.

OPINIONS BELOW

The opinion which is the subject of the present petition is Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). Rehearing en banc was denied on June 3, 1985. The district court's order which was the order appealed is an oral order which the Petitioner has set forth in pages 18(a) to 30(a) of his appendix.

The Florida Supreme Court's opinion which deals with the issue presented here is Ford v. Wainwright, 451 So.2d 471 (Fla. 1984), and it is included in the Petitioner's appendix at pages 13(a) to 17(a).

The prior proceedings involving this Petitioner, aside from those cited above, include: his direct appeal, Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, Ford v. Florida, 445 U.S. 972 (1980); his consolidated original habeas corpus and collateral appeal in the Florida Supreme Court, Ford v. State, 407 So.2d 907 (Fla. 1981); a federal habeas corpus petition which was

denied on December 7, 1981; and affirmance of that denial by a panel and ultimately the en banc Eleventh Circuit, Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982) and Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). The Petitioner was also a named party in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

JURISDICTION

The Respondent accepts the Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Eighth and Fourteenth Amendments quoted by the Petitioner, Fla. Stat. §922.07 (1983) is involved. That statute states:

> 922.07 Proceedings when person under sentence of death appears to be insane.--
>
> (1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.
>
> (2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On July 21, 1974, the Petitioner murdered a police officer in the course of an attempted robbery. After years of litigation, his direct and collateral appeals were concluded. In late 1983, the Governor of Florida appointed a commission of three psychiatrists pursuant to the provisions of Fla. Stat. §922.07 (1983) to evaluate the Petitioner's current mental condition. The commissioners submitted written reports to the Governor, and they all stated their findings that the Petitioner was sane (Petitioner's appendix, pages 160-166).

The Governor signed a death warrant on April 20, 1984, and the Petitioner's execution was scheduled for May 31, 1984. On May 21, 1984, the Petitioner filed in the state trial court a motion for hearing and appointment of experts for determination of competency to be executed. The motion was denied. The Florida Supreme Court, on May 25, 1984, affirmed the trial court's order. Ford v. State, 451 So.2d 471 (Fla. 1984).

The Petitioner then filed his second Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Florida, on May 25, 1984 (Petitioner's appendix, pages 41(a)-152(a)). The district court heard legal argument on May 29, 1984. (An excerpt of the argument is included in the Respondent's appendix at pages 1-23). At the conclusion of the hearing, the district court ruled the petition was an abuse of the writ. (Petitioner's appendix, pages 26(a) and 27(a)). The court ruled alternatively on the merits and denied the petition. (Petitioner's appendix, pages 27(a) and 28(a)).

A divided panel of the United States Court of Appeals for the Eleventh Circuit granted a certificate of probable cause and a stay of execution on May 30, 1984. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). By a vote of 6-3, this Court denied the State's motion to vacate the stay. Wainwright v. Ford, ___ U.S. ___, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984). After full briefing and oral argument, a panel of the Eleventh Circuit affirmed, by a 2-1 vote, the district court's order. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). Rehearing en banc was denied.

B. Statement of the Facts

The Governor of Florida, pursuant to the provisions of Fla. Stat. §922.07(1), appointed a commission of three psychiatrists to examine the Petitioner for the purpose of determining whether he understood the nature of the death penalty and why it was to be imposed upon him.

The commissioners--Doctors Peters Ivory, Umesh Mhatre, and Walter Afield--examined the Petitioner on December 19, 1983. Each commissioner then submitted a written report to the Governor stating his findings.

Dr. Ivory reported:

> I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior he showed that he is in touch with reality . . . (Petitioner's appendix, page 160(a)).

> This inmate's disorder, although severe, seems contrived and recently learned. My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty. (Petitioner's appendix, page 162(a)).

Dr. Mhatre's report to the Governor stated:

> The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized . . .
>
> It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed upon him. (Petitioner's appendix, page 164(a)).

Dr. Afield concluded:

> . . . Although this man is severely disturbed, he does understand the nature of the death penalty that he is facing, and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him. (Petitioner's appendix, page 166(a)).

Thus, all three commissioners independently concluded the Petitioner understood the death penalty and why it was to be imposed on him.

C. How the Federal Questions Were Presented in the Courts Below

The Respondent, in answer to the Petition for Habeas Corpus filed in the district court, alleged the petition was an abuse of the writ. The district court so held. (Petitioner's appendix, page 27(a)).

In his brief filed in the Eleventh Circuit, the Respondent argued as its issue II:

> The district court correctly held review on the merits was barred due to the Petitioner's abuse of the writ.

The Court of Appeal did not reach the issue, stating:

> The summary holding of abuse of the writ on the insanity issue is troublesome under the facts presented. In light of our resolution of the merits of this issue, however, it is not necessary that we reach the question.

Ford v. Wainwright, 752 F.2d 526, 527, n. 1 (11th Cir. 1985).

The Petitioner has otherwise accurately stated the manner in which the federal questions were decided in the courts below.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEAL'S REJECTION OF THE PETITIONER'S CLAIM OF ENTITLEMENT TO A JUDICIAL DETERMINATION OF HIS SANITY TO BE EXECUTED WAS CORRECTLY BASED ON CONTROLLING PRECEDENT OF THIS COURT; ALTERNATIVELY, THE DISTRICT COURT CORRECTLY FOUND AN ABUSE OF THE WRIT AND THUS, AT LEAST IN REGARD TO THIS PETITIONER, CERTIORARI IS INAPPROPRIATE.

The Petitioner asks this Court to grant review of his case for the purpose of creating an Eighth and Fourteenth Amendment right which has never before been recognized by any court. The right the Petitioner seeks to establish is not compelled by the decision in Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) for in Ake the issue was whether the Constitution requires that an indigent defendant be provided with the psychiatric assistance necessary to prepare an insanity defense when sanity at the time of the offense is seriously in question. Ake at 84 L.Ed.2d 58. In the present case, there is no question that the Petitioner was sane at the time he committed the murder, during his trial, and for years thereafter.[1] The validity of his conviction and sentence, the Petitioner concedes, are no longer at issue. (Petition, page 2). The sole contention presented by the Petitioner is the assertion that he has a constitutional right not to be executed due to his alleged present insanity, and that accordingly he is entitled to a judicial determination of his mental condition.

The Respondent maintains the issue presented by the Petitioner is without merit, and the petition should be denied based on controlling authority from this Court. In three prior cases, this Court has rejected the claim

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[1] The Petitioner alleges his mental condition began to deteriorate in December, 1981, seven years after his trial.

presented herein: Nobles v. Georgia, 168 U.S. 398 (1897); Solesbee v. Balkcom, 339 U.S. 9 (1950); Caritativo v. California, 357 U.S. 549 (1958).

First, in Nobles v. Georgia, 168 U.S. 515 (1897), this Court held the question of insanity after verdict did not give rise to an absolute right to have the issue tried before a judge and jury, but was addressed to the discretion of the judge. The court concluded the matter in which the sanity question was to be determined was merely a matter of legislative regulation. This decision led to Solesbee v. Balkcom, 339 U.S. 9 (1950) where the court held the Georgia procedure whereby the Governor determined the sanity of an already convicted defendant did not offend due process:

> We are unable to say that it offends due process for a state to deem its Governor an "apt and special tribunal" to pass upon a question so closely related to powers that from the beginning have been entrusted to Governors. And here the Governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that Governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.
>
> • • • • •
>
> To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved.

Id. at 12-13.

Finally, in Caritativo v. California, 357 U.S. 549 (1958), this Court reaffirmed Solesbee.

The Petitioner's attempt to characterize these

decisions as antiquated relics of an unenlightened era should not be accepted. The thrust of the Solesbee holding is the determination of post-conviction insanity can properly be deemed an executive function because it is akin to clemency, and it did not offend due process for the Governor, with the aid of physicians, to make the determination.

In this case, the Eleventh Circuit found Solesbee dispositive of both the Eighth and Fourteenth Amendment claims because they did not significantly differ. The court noted that Solesbee had been recognized as good law in its recent decision in Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984). Ford v. Wainwright, 752 F.2d 526, 528 (11th Cir. 1985). The Solesbee analysis was also adopted in Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) which held the clemency procedures used by the Florida Governor and his cabinet were an executive function.

The present claim, which concerns the narrow question of sanity to be executed, has never been deemed to be a constitutional right or part of the judicial process. It is a discretionary stage with which the courts are not concerned. Gregg v. Georgia, 428 U.S. 153, 199 (1976). [. . . "a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor . . . The existence of these discretionary stages is not determinative of the issues before us . . .]

It is important to note here that Florida does not purport to execute insane persons. The legislature has enacted Fla. Stat. §922.07 to ensure an insane person is not executed, and it was invoked on the Petitioner's behalf. Pursuant to the statute, the Governor appointed a commission of three experts to examine the Petitioner and they submitted reports to the Governor. All three doctors

determined the Petitioner was sane. Acting on this information, the Governor issued a warrant. As the Respondent pointed out in additional authority submitted to the Eleventh Circuit, the Florida procedure set forth in §922.07 is adequate to prevent the execution of insane persons. In the case of Gary Eldon Alvord, the Governor followed the statute. Two of the appointed commissioners (Drs. Ivory and Mhatre) in Alvord's case were also commissioned in the Petitioner's case. In Alvord, the Governor determined the prisoner was insane and ordered him committed to a mental hospital (see Respondent's appendix, pages 24-29).

The Florida procedure is akin to that of other states. Within the Eleventh Circuit, in Alabama, the trial court has exclusive and nonreviewable jurisdiction to determine if an execution should be suspended due to insanity. Alabama Code, §15-16-23 (1981). In Georgia, as in Florida, the Governor in his discretion may appoint physicians to examine a prisoner, and upon reviewing their reports, he may commit the prisoner to a mental hospital. Georgia Code Ann., §17-10-61. The statute also states that no person who has been convicted of a capital offense shall be entitled to an inquisition or trial to determine his sanity. §17-10-60; McLendon v. Balkcom, 207 Ga. 100, 60 S.E.2d 753 (1950).

Nationally, many states vest the authority to initially inquire into a condemned inmate's sanity in the warden of the prison where he is incarcerated. See, Ariz. Rev. Stat. Ann. (1982), §13-4021; Ark. Stat. Ann. (1977), §43-2622; Calif. Penal Code (1979), §3701; Conn. Gen. Stat. (1980), §54-101; Kan. Stat. (Supp. 1981), §22-4006; Miss. Code Anno. (1983 Supp.), §99-19-57; Neb. Rev. Stat. (1979), §29-2537; Nev. Rev. Stat. (1983), §176.425; New Mex. Stat. Ann. (1978), §31-14-4; Ohio Rev. Code Ann. (1982 Supp.), §2949.28; Okla. Stat. Ann. (1983),

§1005; Utah Code Ann. (1982), §77-19-13(1); Wyo. Stat. (1984 Cun. Supp.), §7-13-901. Other jurisdictions vest this power in the Governor, in procedures similar to Florida's. See, N.Y. Corr. Law (1983 Supp.), §665; Md. Ann. Code, Art. 27 §75(c); Mass. Gen. Laws Ann. (1984 Supp.), Ch. 279 §62. It is evident from a survey of these statutes that the present law, as did the common law, regards the determination of post-sentence insanity as a matter for the executive or the prisoner's custodian to determine, for humanitarian reasons. As the Oklahoma Supreme Court explained in Bingham v. State, 169 P.2d 311 (1946), it is not a right of the prisoner, but based on public will and a sense of propriety. Put another way, the question of supervening insanity is not a right which the defendant may urge or have urged on his behalf by any court; the inquisition may be instituted by the proper officers for humanitarian reasons. State v. Alexander, 49 P.2d 408, 413 (Utah 1935); see also, Berger v. People, 231 P.2d 799, 123 Colo. 403 (1951).

Thus, contemporary statutes are entirely consistent with this Court's reasoning in Solesbee, and the Eleventh Circuit correctly relied on that decision. To conclude otherwise would invite never-ending litigation. The concern of this Court expressed in Nobles v. Georgia, 168 U.S. 398, 405-406 (1897) is just as valid today:

> If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue . . . it would be wholly at the will of the convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.

See also, People v. Eldred, 86 P.2d 248, 103 Colo. 334 (1938); State v. Alexander, 49 P.2d 408 (Utah 1935).

The Petitioner's claim he is entitled to a judicial, rather than a gubernatorial, determination would not end the matter. Certainly he would then claim a right to appeal any adverse district court determination to the Circuit Court of Appeal, and following the appeal, a right to petition this Court for certiorari. By the time this lengthy process would be completed, he could file a new petition claiming that in the time elapsed since the former petition, his condition had significantly worsened so the prior holding was no longer accurate. Thus, the determination of post-conviction insanity has been properly delegated to the executive and it does not rise to the level of a constitutional right. To quote Chief Justice Berger, "All that is good is not commanded by the Constitution and all that is bad is not forbidden by it." Palmer v. Thompson, 403 U.S. 217, 228 (1971).

In the alternative, even if this Court concludes the Petitioner presents an important constitutional question, it should be left to another case to decide it, for the present Petitioner has abused the writ. Rule 9(b), Rules Governing 28 U.S.C. §2254 Proceedings. The Respondent argued abuse of the writ in the courts below and has preserved this defense throughout the proceedings. (See Respondent's appendix, pages 1-23, argument before district court). The district court agreed, finding "an abuse of the writ throughout this matter" (Petitioner's appendix, page 27(a)). In its order granting a stay of execution, a panel majority held only "for the purpose of staying Ford's execution" that there was no abuse of the writ. Ford v. Strickland, 734 F.2d 538, 540 (11th Cir. 1984). The panel which decided the case on the merits characterized the holding of abuse of the writ as "troublesome" but did not decide it. Ford v. Wainwright, 752 F.2d 526, 527, n. 1 (11th Cir. 1985).

The Respondent maintains its assertion of abuse of the writ, in and of itself, is an adequate basis for denial of the petition. There was no need to conduct an evidentiary hearing in the district court, for there were no facts in dispute. The Respondent relied on the dates alleged in the petition to establish his claim that the Petitioner's counsel were well aware of his condition and yet never approached a court until ten days prior to his execution. (Respondent's appendix, pages 17-20). The Petitioner's first habeas corpus petition was, on appeal, heard by both a panel and by the en banc Circuit Court of Appeal. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982); Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). The second petition, filed when execution was imminent, was, like Woodard v. Hutchins, ___ U.S. ___, 104 S.Ct. 752, 78 L.Ed.2d 541, 549 (1984), "another capital case in which a last minute application for a stay of execution and a new Petition for Writ of Habeas Corpus relief have been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ."

Therefore, without regard to the issue raised by the Petitioner, the court below's decision is sustainable on the alternative basis of abuse of the writ.

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities, the Respondent respectfully requests that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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LOUIE L. WAINWRIGHT, Secretary,
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CERTIFICATE OF SERVICE

I, Joy B. Shearer, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, in the above case to counsel for Petitioner, by depositing same in the United States mail, first class postage prepaid, addressed as follows:

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All parties required to be served have been served. Done this 21st day of October, 1985.

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